Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

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February 16, 1979

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

IRA M. BALL, Individually and as a member and Chairman of the New York State Bingo Control Commission, DR. CARMINE G. FREDA, LEO A. PICKNEY and HAROLD R. MOSKOVIT, Individually and as members of said Commission, Suing on Behalf of Themselves, Staff Members and Employees of the State Bingo Control Commission; THOMAS P. LYNCH and JOHN TEDESCO, Individually and as Staff Members of said Commission, on behalf of themselves and other employees of said Commission; MARJORIE M. JENSEN, Individually and as confidential Secretary to said Commission; NORMAN HAGADORN, ALLEN LENNFELD, WILLIAM J. KELLY, EDWARD T. KELLY, FLOYD BURD, LLOYD WHITNEY, LEWIS W. SMITH, WILLIAM KISSAM, WILLIAM SIMMONS, RICHARD SOULE, EDWARD GREEN, Individually and as Members of the Investigative Staff of said Commission, on behalf of all other investigators and employees of said Commission,

Petitioners,

-vs-

HUGH L. CAREY, Individually and as Governor of the State of New York; DAVID W. BURKE, Individually and as Secretary to the Governor; MARIO M. CUOMO, Individually and as Secretary of State; DONALD A. CROTEAU, Individually and as the Administrative Director of Department of State; PETER GOLDMARK, Individually and as Director of Budget; JOHN W. VAN LAAK, Individually and as Chief Budget Examiner; BERTRAM D. SARAFAN, Individually and as Chairman of the Racing and Wagering Board; EUGENE J. KEOGH and JOSEPH H. BOYD, JR., Individually and as Members of the State Racing and Wagering Board; BERNARD GOLAR, Individually and as acting Director of Bingo, JOHN DAILEY, Individually and as Counsel, and MICHAEL R. GARDINEER, Individually and as Administrative Officer, all as Staff Members of the Racing and Wagering Board; ARTHUR LEVITT, Controller of the State of New York; ERSA POSTON, President of the Civil Service Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

IRA M. BALL, one of the Petitioners herein, prays that a Writ of Certiorari

be issued to review the Decision and Order of the Appellate Division of the Supreme Court, Third Department, of the State of New York, entered in the above-entitled case on July 10, 1978 and the judgment entered thereon.

OPINIONS BELOW.

This Court is being asked to review the Opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department, affirming the dismissal of the Petitioners' Complaint. That Court's Opinion is reported at 64 A.D. 2d 723, 407 N.Y.S. 2d 76 and is printed in Appendix A,* pgs. A-1 - A-4. Judgments were entered upon said Order

* The Appendicies herein will be filed with this Court under separate cover.

and they are printed in Appendix A, pgs. A-5 - A-11.

Petitioners sought to appeal said Decision directly to the Court of Appeals of the State of New York as a matter of right but Respondents' motion to dismiss that appeal was granted on September 26, 1978 on the ground that "no substantial constitutional question was directly involved." The Court's Memorandum is reported in 45 N.Y. 2d 837 and printed in Appendix A along with the Order of that Court at pgs. A-12 - A-14.

Petitioners thereafter moved for leave to appeal to the Court of Appeals of the State of New York. The motion was denied on December 6, 1978 with a Memorandum not yet reported. The Memorandum is printed in Appendix A, pg. A-15. The Order of

that Court is printed in Appendix A, pgs. A-15 - A-16. The Judgment entered thereon is printed in Appendix A, pgs. A-17 - A-18.

The Opinion of the Special Term of the Supreme Court, Albany County, (Conway, J.) which dismissed the Plaintiffs' Complaint, not reported, is printed in Appendix B, pgs. B-1 - B-9. The Order of said Court is printed in Appendix B, pgs. B-10 - B-14. In the same Opinion and Order, Special Term also denied Petitioners' motion to add parties Plaintiff. Thereafter Special Term denied Petitioners' motion for reargument, without opinion. The Order is printed in Appendix B, pgs. B-15 - B-16.

The Opinion of the Special Term of the Supreme Court, State of New York, denying Petitioners' Motion for a Preliminary Injunction, dated March 23, 1976, is

reported at 85 Misc. 2d 1052, 381 N.Y.S. 2d 651 and is printed at Appendix C, pgs. C-1 - C-6. The Order of said Special Term (Casey, J.), dated April 13, 1976, is printed in Appendix C, pgs. C-7 - C-10.

Mr. Justice Casey's Order denying Petitioners' motion for reargument or renewal of the motion for a preliminary injunction was denied without opinion by Order dated May 14, 1976, printed in Appendix C, pgs. C-11 - C-14.

Closely Related Decisions

Both Special Term Justices herein who (1) denied a preliminary injunction (Appendix C, pgs. C-1 - C-6) and (2) dismissed Petitioners' Complaint for failure to state a cause of action (Appendix B, pgs. B-1 - B-9), specifically stated

their Decision to be contrary to the decision of the New York Court of Claims in Ball v. State, 83 Misc. 2d 903, 373 N.Y.S. 2d 761. The Court of Claims judgment held that the New York State Bingo Control Commission had not been abolished by the enactment of the 1975-76 State Budget. It was affirmed by both the Appellate Division, Third Department, in 52 A.D. 2d 47, 382 N.Y.S. 2d 835 and the Court of Appeals in 41 N.Y. 2d 617, 394 N.Y.S. 2d 597. The Court of Appeals Opinion is attached as Appendix D, pgs. D-1 - D-24. The Appellate Division Decision is attached as Appendix D, pgs. D-25- D-37.

Another closely connected case also cited by both Special Term Justices herein to sustain their Decision on said

motions is Church of the Ascension v. New York State Racing & Wagering Board. The Special Term Decision therein was not reported and was reversed in 55 A.D. 2d 874, 390 N.Y.S. 2d 113, which reversal was in turn affirmed by the New York State Court of Appeals on December 20, 1978, not yet reported but a copy of the Court's Opinion is printed as Appendix E, pgs. E-1 - E-2. This case proves the usurpation by Respondents of the Petitioners' offices and positions as alleged in the "SECOND CAUSE OF ACTION" of the Petitioners' Complaint (37-44)* particularly paragraph "21.B." (41-42).

* Figures in parenthesis refer to the Record on Appeal to the Appellate Division, Third Department, a copy of which is to be filed with this Petition.

JURISDICTION.

The Order of the Court of Appeals denying leave to appeal the Appellate Division Decision to that Court (Appendix A, pgs. A-15 - A-16), was entered on December 6, 1978. A final judgment dismissing Petitioners' Complaint on the merits was entered in the Albany County Clerk's Office on January 9, 1979 and is printed in Appendix A, pgs. A-17-18. The jurisdiction of the Supreme Court is invoked under 28 USCA, §1257(3). See: Southern Elect. Co. v. Stoddard, 269 U.S. 186, 70 L Ed. 227; McMaster v. Gould, 276 U.S. 284, 72 L Ed. 574, 7 L Ed. 2d 1025 at 1132-1134.

QUESTIONS PRESENTED.

1. Are the Governor of the State of New York and the other Respondent members

of the Executive Department of the State who are named in the title to this action, all of whom are sued personally as individuals, "absolutely immune from liability for the (intentional) tortious conduct" attributed to them in the Petitioners' Complaint, where said intentional tortious conduct involved the wrongful discharge of the Petitioners, some of whom had permanent civil service status and others of whom held unexpired terms as appointed State officers, where said action was taken without any authority and the action was beyond the scope of their constitutional and statutory authority?

2. Do the Respondent New York State officials specified in the title to this

action, who are sued personally and as individuals and not as State officials, have "absolute immunity" from personal liability for damages suffered by the Petitioner State officers and permanent civil service employees, all of whom have been deprived of their employment and compensation therefore by reason of the illegal and unlawful termination of their employment (1) without due process of law and (2) in violation of their rights of equal protection under the law, afforded them by §§6 and 11 of Article 1 and Article 5, §6 (civil service Petitioners only) of the New York State Constitution and the Fourteenth Amendment to the United States Constitution?

3. Did the Petitioner State officer

members of the New York State Bingo Control Commission have "standing to raise the (constitutional) issue" on behalf of themselves and the licensees of said Commission, that said eleemosynary licensees were being forced pay an illegal and unconstitutional "excise tax", in the form of a license fee, for the right to conduct bingo games in the State of New York, in derogation of the Fourteenth Amendment to the United States Constitution and Article 1, §11 of the New York State Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, Fourteenth Amendment, §1:

"All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION, Article 1, §6:

"No person shall be deprived of life, liberty or property without due process of law."

NEW YORK STATE CONSTITUTION, Article 1, §11:

"No person shall be denied the equal protection of the law of this state or any

subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

NEW YORK CIVIL SERVICE LAW, §75:

"Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by

permanent appointment in the competitive class of the classified civil service, or * * *."

§ 433. Commission created; personnel

1. There is hereby created in the department of state a state bingo control commission, which shall consist of a chairman and four other members, all of whom shall be citizens and residents of the state, and not more than three members of which shall belong to the same political party.

2. No member, officer, or employee of the commission shall

(a) hold any other public office;

(b) be employed by or have any pecuniary interest in any firm or corporation owning or having any interest in premises used for the conduct of bingo games on a commercial rental basis or any firm or corporation engaged directly or indirectly in the manufacture, distribution or sale of supplies and equipment for bingo, or be related in the first degree to, or be the spouse of, any person so employed;

(c) be an officer or director of any organization licensed to play bingo;

(d) engage in private employment or in a profession or business which shall interfere or conflict or in any way tend to interfere or conflict with the performance of his duty as member, officer or employee of the commission, nor shall any such member, officer or employee engage in any business or transaction or professional activity or incur any obligation of any nature which is in conflict, or which in any way tends to conflict, with the proper discharge of his official duties.

3. Each member of the commission, including the chairman, shall be appointed by the governor, by and with the advice and consent of the senate, for five years, provided, however, that of the members first appointed, two shall be appointed for terms of

two years and two for three years, from the effective date of this amendment, with the chairman appointed for five years from such date. Their successors shall be appointed for terms of five years.

4. Any member of the commission may be removed by the governor for cause after an opportunity to be heard. A statement of the cause of his removal shall be filed by the governor in the office of the secretary of state.

STATEMENT OF THE CASE.

The Petitioners seek to recover damages from the Respondents, who are sued as individuals, for their intentional malicious interference with Petitioners' employment which resulted in their wrongful discharge from their state offices and employment.

Eleven of the Plaintiffs-Petitioners had permanent civil service appointments, four are State officers with term appointments which were made by the Governor and confirmed by the New York State Senate. The remaining Plaintiffs-Petitioners were staff members employed by the New York

State Bingo Control Commission (hereinafter referred to as "Bingo Commission") who were never dismissed by that Commission but were terminated by Respondents.

The Defendants-Respondents are the Governor of the State of New York, Hugh L. Carey, and members of his staff and other members of the Executive Department of the State of New York specifically identified in par. "8" of Petitioners' Complaint (30-32). They are all sued individually except for Comptroller Arthur Levitt and Ersa Poston, President of the New York State Civil Service Commission (28-30), against whom no judgment is sought. (32)

The Respondents' motion to dismiss the Petitioners' Complaint was made before answer and none of the Respondents have challenged any statements of fact set

forth in any of the Petitioners' various affidavits in support of their motion for a preliminary injunction or in opposition to granting Respondents' motion to dismiss the Complaint or in support of Petitioners' motion for summary judgment. Therefore, the Decision of the Appellate Division rests solely on the facts as set forth in the Plaintiffs-Petitioners' Complaint and the affidavits submitted on the five motions (two for reargument) set forth in the Petitioners' Record on Appeal to the Appellate Division.

Under the foregoing circumstances, Petitioners are entitled to have the Complaint construed in their favor (See Conley v. Gibson, 355 U.S. 41, 45-46.)

The procedural importance of this fact is that the Appellate Division has granted

Respondents complete and absolute immunity from liability for their intentional malicious interference with the Petitioners' employment without having a scintilla of evidence before it showing facts or circumstances which, coupled with proof of their good faith, might afford the Respondents a basis for being granted absolute immunity. Actually, Respondents never did claim any immunity since their defense throughout has been that their actions were legal (119, 125, and see pg. 9, Respondents' Brief to the Appellate Division, copy to be filed with Petition.).

Certain allegations of the Complaint herein must now be considered to be proven and res adjudicata as against the Respondents or, at least, they are collaterally estopped from denying said

allegations in Petitioners' Complaint. (See 5 New York Civil Practice, Weinstein-Korn-Miller, commencing with ¶5011.23, pgs. 50-114.) They are:

First, the allegations of the usurpation of the Petitioners' offices and positions as alleged in Petitioners' "SECOND CAUSE OF ACTION," ¶¶20-26 of the Complaint (37-44). This has already been decided by the New York Court of Appeals in the Church of the Ascension case, Appendix E, pgs. E-1 - E-2, which affirmed the Appellate Division, First Department, reported at 55 A.D. 2d 874, 390 N.Y.S. 2d 113 at 114, which actually involves the incident alleged in ¶21.B. of the Complaint (41-42).

Second, the allegations that neither the Bingo Control Commission itself nor the positions of the Plaintiffs-Petitioners

were abolished by the Legislature during the fiscal years 1975-76 and 1976-77. See Ball v. State, Appendix D, pgs. D-1 - D-24. Also see "FOURTH CAUSE OF ACTION," ¶¶37-44 (47-50), and the "FIFTH CAUSE OF ACTION," ¶¶45-50 (51-52) of the Complaint.

Therefore, this statement will be mainly devoted to the evidence of the Respondents' lack of good faith and their participation in a conspiracy to maliciously interfere with the Petitioners' employment.

One of the primary requirements of this Court with regard to the question of "absolute immunity" is the "good faith" of the official who acts. (Scheuer v. Rhodes, 416 U.S. 232 at 245-6; "Private Wrongs of Public Servants," 47 Calif. L.R. 303 at

323-4*, notes 123 and 124.)

The Court should note that the question of the "good faith" of the Respondents also comes into question under New York Civil Service Law with regard to the abolishment of the permanent civil service positions held by some Petitioners. It is well established in New York that an employee, holding permanent status in the classified civil service, may be suspended

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* "The only general statement safe to make is that ordinarily official get no favors from the law, but that in certain circumstances which must be ascertained from case to case and which depend on the injury complained of, a lesser standard, but never less than honesty of motive, will constitute a valid defense. However, if this is true, that the maximum lattitude allowed any administrative official in exercising his power is to act in good faith, then Dicey's argument is upheld, for his statement was clearly intended only to emphasize that officials arbritrariness under the Anglo-American law resulted in the personal liability of the official to his victum." (Emphasis supplied.)

as a result of abolition of his position for reasons of economy provided that the abolition is necessary and made in good faith.

See New York Civil Service Law, §§80, 80-a.

Matter of Schwab v. Bowen
80 Misc. 2d 763, 363 N.Y.S. 2d 464; affd. 51 A.D. 2d 574, 379 N.Y.S. 2d 111; affd. 41 N.Y. 2d 907, 394 N.Y.S. 2d 616.

Also see cases cited in New York State Attorney General's Opinion given to Respondent Goldmark's deputy, dated May 21, 1976 (274-275).

There is no difference with regard to immunity from liability between federal and state officials. See United States v. Lee, 106 U.S. 196, discussed in 77 Harvard L.R., pg. 1 at 23, "Suits Against Government and Officers: Sovereign Immunity.",

by Louis L. Jaffe, where the author states: "Furthermore, no distinction has ever been explicitly recognized in the cases between suits against state and against federal officials since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of cases."

When the Complaint was drawn, it was the primary intent of the Petitioners to compel the Respondents to reinstate the Bingo Control Commission, the Legislature having failed to adopt the necessary legislation to abolish the Commission and transfer its responsibilities to the Racing & Wagering Board (53-56 (Petitioners' Prayer for Relief) and Ball Affidavit, ¶9, pgs. 139-143).

However, with the denial of the Petitioners' motion for a preliminary injunction (Appendix C, pgs. C-1 - C-6), which the Court did not decide for four months, the dismissal of the Petitioners' Complaint (Appendix B, pgs. B-1 - B-9), which Decision was also delayed an additional month, and finally the passage of the bill actually abolishing the State Bingo Control Commission effective April 1, 1977, there is now left for adjudication only the causes of action alleging damages to the Petitioners for the intentional malicious interference with Petitioners' employment and wrongful discharge from their offices and civil service positions. It is with regard to these remaining causes of action that the Appellate Division, Third Department,

held, upon its own initiative, that the causes of action are barred by reason of the absolute immunity of the Defendants-Respondents. (Appendix A, pg. A-3)

The question of Respondents' immunity was never raised by the Respondents as a defense (119-128). Throughout this action, Respondents have always maintained that the Respondents' dismissal of the Plaintiffs was a lawful action. They claimed that what had occured was "the transfer of the functions of the (Bingo) Commission to the State Racing & Wagering Board." (120-124, ¶¶5-12). An examination of the parties' Briefs to the Appellate Division (to be filed with the Court) will reveal that the question of "absolute immunity" was not even briefed by either party. It was first raised by

by the Presiding Justice of the Appellate Division on the argument of the appeal when your Petitioner was asked whether or not the Respondents would not have immunity as to the causes of action set forth in the Plaintiffs' Complaint. Petitioner answered that the Respondents did not have immunity from an intentional tort.

This Court has held that officials "who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.", Butz v. Economu, ___ U.S. ____, 57 L Ed. 2d 895, at 916)*. There

* It is submitted that although Butz involved a federal officer, the rule is and should be the same for a state officer.

is total lack of any such proof.

THE FACTS.

Without any consultation with the Bingo Commission*, in January, Governor Carey announced in his 1975-76 Executive Budget his proposal to abolish the Bingo Control Commission and transfer its functions to the State Racing & Wagering Board (hereinafter designated as "R & W Board") to cut back the overhead costs of State government (A-6**; 47-58). On February 28, 1975, Budget Bill S3492/ A4509 calling for the abolishment of the

* Bingo was legalized by an amendment to the New York State Constitution in 1957 and implementing legislation was adopted effective January 1, 1958. The Commission was established as an absolutely independent body.

** Figures preceded by "A" refers to pages of Appendicies attached to Petitioners' Appellate Division Brief, a copy of which will be submitted with this Petition.

Bingo Commission was introduced by the Governor (59-a).

On March 10, 1975, 16 days before the budget was adopted, the Bingo Commission transmitted to the Governor an in-depth "Memorandum in Opposition" to the abolition and, in an accompanying letter (A-1)*; Chairman Ball stated:

> "I believe it most important that (such) a meeting be arranged in view of the fact that the cost of operating this Commission is completely supported by the fees paid by the charitable organizations conducting bingo, with a 'profit' of at least $300,000 during 1974 for the State.
>
> * * *
>
> Since legalization, bingo has never been considered as a revenue raising program by the State. * * * I cannot believe that you would have any part of 'taxing' churches, parochial schools, volunteer fire departments, American Legion posts and many other similar charitable organizations, just to raise revenue for the State." (A-1)(Emphasis supplied.)

* Attached to Petitioners' Appellate Division Brief.

The day before the 1975-76 State Purposes Budget was adopted by the Legislature as Chapter 50 of 1975, Chairman Ball received a reply to his letter from Governor Carey. In part the Governor wrote:

> "As you correctly point out, the State's interest in bingo is not to raise revenue for State purposes. Rather, the State's interest is to ensure the integrity of this important revenue source for churches, schools, volunteer fire departments, and other non-profit organizations eligible to conduct bingo as a fund-raising device." (72-3)

But, at pgs. 436-7 of his Executive Budget (A-3)*, under the title "REGULATION OF WAGERING", the Governor took the exact opposite position in his message to the Legislature, stating:

> "Legalized wagering produces significant amounts of public revenue which would otherwise have to be raised through taxes."

* * *

* Attached to Petitioners' Appellate Division Brief.

> "Transfer of responsibility for regulation and control of Bingo from the Department of State to the Board is also recommended in order to complete the consolidation under the jurisdiction of the Board of regulation of all types of legalized wagering activities." (Emphasis supplied.)

It is obvious that from the very start of fiscal year 1975-76 the Governor intended to use the income from bingo licensing fees for "public revenue" which he actually did in the amount of over one million dollars as is proven by the report of the Director of State Accounts to Petitioner Ball (276).

The requested meeting never took place and, although the bill to abolish the Bingo Commission (A4509) passed the Assembly, it never passed the Senate. In spite of the fact no funds were actually to be appropriated to the R & W Board unless

and until the Bingo Commission was abolished by the Budget Bills, between April 1 and 10, 1975, the Respondent Secretary of State Cuomo and Respondent Croteau dismantled both the Albany and New York City Offices of the Bingo Commission, "terminated" the Commissioners, its staff and all permanent civil service employees of the Commission except for ten people transferred to the R & W Board.

On April 7, 1975, Respondent Carey signed the amended State Purposes Appropriation Bill which became Chapter 50 of the Laws of 1975. On April 9, Petitioner Ball received a letter of termination from the Respondent Burke, Secretary to the Governor, who stated that the reason for Ball's termination was the "difficult

fiscal circumstances."* (74) Burke wrote Ball:

> "The Bingo Control Commission was among these (abolished) and he (Governor Carey) has now signed into law the legislation effecting this elimination." (Emphasis supplied.)(74)

This was a total misstatement of fact because the State Senate had not passed the legislation necessary to abolish the Bingo Commission. On April 11, in rejecting the notice of termination, Ball wrote Burke a letter wherein he challenged his statement that the Governor had signed the bill abolishing the Commission and the Respondents' right to "eliminate" the Commission and to terminate his office (75); pointed out there were no "difficult fiscal circumstances" with regard to funding the Bingo Commission (76); stated that the Governor was violating his Oath

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* This was the same reason given to the other Petitioners.

of Office; warned that the "State of New York cannot siphon off three quarters of a million dollars (from bingo license fees) for general tax purposes." (77-79) The Court is urged to read the letter in toto since the letter goes to the very heart of this entire situation.

Respondent Burke replied to Ball on May 1, 1975 (80), admitting that only the Assembly had passed the budget bill abolishing the Bingo Commission but he claimed that:

> "(A)ssurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it will be passed by the Senate. These assurances were requested after the Legislature did approve the transfer of funds to the Racing and Wagering Board for the purpose of regulating bingo. These actions can be interpretted as a statement of legislative intent to formally abolish the Commission by passage of the implementing legislation which carries an effective date of April 1, 1975." (Emphasis supplied.)

With the foregoing statement Respondent Burke jumped from the frying pan into the fire because with this letter Burke added two more totally false statement to his first one that the Governor had signed the bill which eliminated the Commission.

On May 5, 1975, Chairman Ball wrote Senator John J. Marchi, Chairman of the Senate Finance Committee, asking for an explanation of Respondent Burke's statement that "assurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it (the bill abolishing the Bingo Commission) will be passed in the Senate." (164)

In Senator Marchi's reply to Chairman

Ball (165) he ended his letter as follows:

> "You will also note that the memorandum does not make any commitment as to future action of the Committees or the Senate or the Assembly concerning other bills pending before the legislature." (Emphasis supplied.)

This is proof absolute of Respondent Burke's second falsification.

The "memorandum" referred to above is that of the Secretaries of the Senate Finance and the Assembly Ways and Means Committees and is printed at pgs. 25-26 of the Record on Appeal. The Court's attention is directed to the following sentence in the fourth paragraph of the memorandum, dated the same day the 1975-76 Budget was adopted:

> "Normally, in the absence of specific language so provided, we do not interpret an appropriation act as furnishing substantive authority to public officers, departments and agencies

> to perform functions, powers and duties." (Emphasis supplied.)

This was a clear warning to the Respondents Carey, Burke, Goldmark and Van Laak that there had been no "function transfer" of Bingo functions to the R & W Board by adoption of the Budget, a warning which the Respondents proceeded to completely ignore.

The third, and in many ways the most important misrepresentation of fact by Burke, was his statement in the second paragraph of his letter to Ball (80) that "these assurances were requested after the Legislature did approve the transfer of funds to the Racing and Wagering Board for the purpose of regulating bingo." (Emphasis supplied.) The language of the Joint Legislative Committee was very clear in its

"Statement of Intent" (100) and it is now res adjudicata from the Court of Appeals Opinion in Ball v. State (Appendix D, pgs. D-1 - D-24, that there was no "transfer of funds to Racing and Wagering for the purpose of regulating bingo." As a matter of fact, the Court of Appeals (41 N.Y. at 622) held that a fair reading of the "Statement of Intent" clearly indicated that it was the expressed intent of the Joint Committees not to abolish the Bingo Commission unless and until Budget Bill S3429/A4509 became law.

But the Respondents decided to "stonewall it" and took the position that the abolishment of the Commission was accomplished by the adoption of the 1975-76 Budget and the Joint Reports of the Legislative Fiscal Committees. (A-15)*

* Attached to Petitioners' Appellate Division Brief.

After the Legislature adjourned on July 12, 1975, Petitioner Ball attempted, through the Respondent Cuomo, to have the Bingo Commission reinstated (139) and on the 15th of July, he met with Robert Morgado, then Assistant Secretary to Respondent Carey, who, after a short discussion, informed Ball that "he was going to call a meeting of representatives from Budget, the Governor's Counsel's Office, perhaps Audit and Control, Chairman Sarafan of R & W Board, Secretary of State Cuomo, Chairman Ball and himself sometime during the week of July 20, 1975; that Chairman Ball was to be responsible for the Agenda." (140)

On the morning of July 15, Chairman Ball was informed by former Bingo

Commission Senior Stenographer Kathy Grogen that: "I'm sorry Mr. Ball, but I have received instruction from the R & W Board in New York (Petitioner believes that she said Mr. Golar) ordering me not to do anything for you. That's why I haven't typed up the letter.", which Chairman Ball had given Ms. Grogen the day before (141).

The same day, Chairman Ball was informed by one of the senior accountants, formerly in the New York City Office of the Bingo Commission, from whom he had requested the number of audits conducted by the Bingo Commission accounting staff since April 1, 1975, that "Mr. Golar had instructed him (the accountant) not to give any such information, that he (Ball) should apply in writing as required by

the Freedom of Information Act." (141)

> "That immediately after the aforesaid conversation with the accountant, your deponent (Ball) called the defendant Sarafan and said: 'What the hell's going on Bert? Since February you have always taken the position that you would not assume any of the duties and responsibilities of the Bingo Commission until the bill (S3492/A4509) was passed and the Commission abolished. What the hell's going on?' The defendant Sarafan replied: 'You are absolutely right, Ira. But Monday (or Tuesday) I got a call from John Van Laak who told me that Burke had told him that they (the Executive Department) was going to stand on the Executive Budget and the Appropriation Bill for authority for me to take complete charge of Bingo. I told Van Laak that they were crazy, but what the hell could I do, Ira, you know my position.' The defendant Sarafan's 'position' is that he serves as Chairman of the R & W Board <u>at the pleasure of the Governor</u>." (143)(Emphasis supplied.)

The foregoing stands undenied.

Before noon on July 22, Chairman Ball delivered to Mr. Morgado's office the

Agenda he had prepared for the meeting Morgado said he was going to call. Mr. Ball was told to return after 2 p.m. because Mr. Morgado was "with the Governor." Although Mr. Ball returned to Mr. Morgado's Office he was unable to see him that day and, in spite of the fact he left messages with Mr. Morgado's secretary, Chairman Ball never thereafter heard from either Mr. Morgado or his secretary. (142)

On the 15th of August, 1975, the Respondent Governor set out on a course of action that was completely inconsistent with the position he and the other Respondents had taken with relation to the Bingo Commission.

From the start, when the Respondent Carey submitted his Executive Budget for

1975-76 to the Legislature, the documentary evidence proves that he intended to treat the abolishment of the Bingo Commission and the Athletic Commission in the identical manner.

In the "MESSAGE OF THE GOVERNOR", under the title "HIGHLIGHTS OF THE 1975-76 BUDGET" (A-6)*, the Respondent Carey states:

> "I have spoken to you of my determination to cut back the overhead costs of State Government as far as possible. To that end, I am recommending several changes in agency structure and staffing patterns to be implemented during 1975-76. Under my proposals:
>
> * * * *
>
> The Bingo Control Commission will be abolished and its functions transferred to the State Racing and Wagering Board;
>
> The Athletic Commission will be abolished and its regulatory functions transferred to the Department of State;
>
> * * * *."

* Attached to Petitioners' Appellate Division Brief.

To implement the foregoing, on February 28, 1975, Respondent Carey introduced consecutive Budget Bills S3492/A4509 (59a-59d) and S3493/A4510 (162) to abolish the Bingo Commission and the State Athletic Commission. Both bills were passed by the State Assembly on March 25-26, 1977 (A-8)* He made no provision for funding either Commission in his Executive Budget. There was no mention in the State Purposes Appropriation Bill (Chapter 50 of the Laws of 1975) of an appropriation for either Commission. Up to the time of the adjournment of the Legislature, both Commissions were treated like "Siamese twins."

But on August 15, 1975, Respondent Carey appointed James A. Farley, Jr., as a member and chairman of the State Athletic Commission (81) and in the press release

* Attached to Petitioners' Appellate Division Brief.

announcing the appointment is found the following:

> "The Governor named Mr. Farley to the position after the Legislature failed to approve his proposal to transfer the powers and duties of the Athletic Commission to the Department of State." (Emphasis supplied.)

This is documentary proof that the Governor and the other Respondents knew and understood from the very start that the failure of the Legislature to pass the Governor's Budget Bills to abolish the Bingo Commission and Athletic Commission legally prevented the transfer of any powers and duties of the Bingo Commission to the R & W Board.*

It is submitted that the Respondents cannot have it both ways: If the State Athletic Commission was not abolished as must be conceded from the certification

* See Respondent Sarafan's statement on pg. 39, supra.

of appointment by the Respondent Cuomo (81), then the Bingo Commission also must be considered as having survived as the Court of Appeals held in Ball v. State. The appointment of Farley and the implementation of his appointment by Respondents Carey, Goldmark, Van Laak, Cuomo and Croteau resulted in a binding practical interpretation that the Governor failed to abolish both Commissions, that the Bingo Commission had survived and as a matter of law, it was entitled to the same treatment accorded the Athletic Commission. See U.S. v. American Trucking Assoc., 310 U.S. 534.

The treatment accorded the Petitioners by Respondents as compared to the continuation and funding of the Athletic Commission was so discriminatory that it must

be held that Respondents have denied the Petitioners their constitutional right to equal protection under the law.

But there is additional proof Respondents knew the Bingo Commission had not been abolished. On January 20, 1976, knowing the Bingo Commission still legally existed, Governor Carey submitted to the Legislature another Budget Bill calling for the abolition of the Bingo Commission (101), identical with the 1975 Budget Bill except Sec. 8 of the 1975 bill was omitted and Sec. 9 reworded and renumbered Sec. 8 to read as follows:

"All appropriations made to the state bingo control commission pursuant to section one of chapter fifty of the laws of nineteen hundred and seventy-five,* to the extent of remaining unexpended balances, are hereby transferred to and made available for use by the state racing and wagering board for the payment of liabilities heretofore incurred by the state bingo control commission." (Emphasis supplied.) (102)

This was a blatant admission** that funds had not been appropriated to the R & W Board in the 1975-76 Budget as Petitioners maintained in their moving affidavit on their motion to dismiss the within Complaint, sworn to on the 16th day of December, 1975 (119-125) and that the Respondents*** knew it when the Bingo

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* The 1975-76 Appropriation Bill

** So treated by Judge Gabrielli in his Court of Appeals Opinion at pgs. 621-22 of 41 N.Y. (See Appendix pg. D-8)

*** Reference to Defendants-Respondents is to all Defendants except Posten and Levitt.

Commission was "plowed under" by them. This is documentary proof positive of the lack of good faith (possibly perjury) on the part of the Respondents since the 1976 Budget Bill was prepared and submitted to the Legislature by the Executive Department (101).

In summary, the Respondents' total lack of good faith and their malicious and reckless disregard of the rights of all the Petitioners are proven by the following:

(1) The total failure of the Respondents, particularly Carey, Goldmark, Burke and Van Laak, to consult with the members of the Bingo Commission prior to the preparation of the 1975-76 Executive Budget (or at anytime) as to what the effect of the transfer of the responsi-

bilities of the Bingo Commission to the R & W Board, with a greatly reduced staff, would have on the bingo enforcement program.

(2) Misrepresentations by the Respondent Carey in his letter of March 10, 1975 to the Petitioner Ball that he did not intend to use Bingo licensing fees "to raise revenue for State purposes" (72), which Ball at least inferentially accused Carey of having as his intention (A-1)*.

(3) The termination of the operation of the Bingo Commission without any statutory or other authority. (See Ball vs. State, Appendix D, pgs. D-1 - D-24, and Church of the Ascension case, Appendix E, pgs. E-1 - E-2.

* Attached to Petitioners' Appellate Division Brief.

(4) The false statement written by the Respondent Burke to the Petitioner Ball, indicating that (a) the Senate had passed or, later, was going to pass the bill to abolish the Bingo Commission and (b) that there was a lack of funds to continue the operation of the Bingo Commission when there was more than sufficient funds available (36).

(5) False representations by the Respondent Burke "that assurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it (Budget Bill S3492) will be passed in the Senate." (80), when no such assurance had been given (165 and 26).

(6) Total disregard of the contents of Deputy Comptroller's Ives' memorandum of

March 31, 1975 (25) that (a) Audit and Control did "not interpret an appropriation act (Chapter 50 of 1975) as furnishing substantive authority to public officers, departments, and agencies to perform functions, powers and duties," and (b) to effectuate the transfer of functions, powers and duties "the enactment of substantive changes in the law" had to be made and the Respondents then adopting the contrary as "State policy." (25 and A-15*)

(7) The refusal of the Respondents Carey, Burke, Goldmark, Van Laak, Cuomo and Croteau to meet with Chairman Ball, after the adjournment of the Legislature without adopting the bill to abolish the Commission (139-142), to "revive" the Bingo Commission.

(8) Delibrately ignoring the clear

* Attached to Petitioners' Appellate Division Brief.

language of the "Statement of Intent" set forth in the 1975 Report of the Joint Legislative Fiscal Committees "on actions taken on the 1975-76 Executive Budget." (See Ball v. State, Appendix D, pgs. D-1 - D-24)

(9) The inherent admission by Respondent Carey in appointing James A. Farley, Jr., as a member of the State Athletic Commission and Chairman "after the Legislature failed to approve his (Carey's) proposal to transfer the powers and duties of the Athletic Commission to the Department of State" (A-5)*, that Respondents knew, prior to August 15, 1975 (81), that it was mandatory that Budget Bills be passed before either the Athletic Commission or the Bingo Commission could

* Attached to Petitioners' Appellate Division Brief.

be legally abolished and their duties and responsibilities transferred elsewhere and then maintaining the contrary upon their motion to dismiss Petitioners' Complaint herein.

(10) Finally, written proof of the complete lack of good faith on the part of the Respondents is established by the letter written 29 days before James A. Farley's appointment, on July 17, by Deputy Director of the Division of the Budget Miller (A-15)* to the Respondent Sarafan regarding "the disposition of the State's Bingo Control Activities." which "should be considered State policy on this matter." Paragraphs two, three and four of the letter are replete with misstatements of facts, particularly with

* Attached to Petitioners' Appellate Division Brief.

regard to the intent of the Legislature by enactment of Chapter 50 of the Laws of 1975 as the Court of Appeals and Appellate Division found in Ball v. State, Appendix D, pgs. D-1 - D-37.

In the Depression years of the 1930's, Mr. Justice Peter Schmuck, in the case of Danker v. Dptmt. of Health, 153 Misc. 502, 276 N.Y.S. 239; affd. 242 A.D. 765, 275 N.Y.S. 340; affd. 256 N.Y. 365, established the standard by which the action of any municipality or other level of government should be measured when terminating, for alleged reasons of economy, the positions of civil service personnel holding permanent appointments. The case dealt with the suspension of a civil service employee in New York City and, at pgs. 239-241 of 276 N.Y.S., he stated:

"As the question here involved is of vital importance, not only to Plaintiff, but to many others in a similarly unfortunate condition, meticulous consideration has been given to it, not only to observe the letter of the law,* but especially to invoke and obey the spirit thereof.

* * *

"Above all, the suspension must be occasioned by lack of funds, lack of work, and the advisability of temporary abolition of the postition.

* * *

"***, yet shall the Petitioner have her prayer granted, for in a government by law all must be satisfied that constituted authority must exercise delegated powers sincerely, in good faith, and with unquestionable impartiality." (Emphasis supplied.)

It is respectfully submitted that the Respondents herein did not meet any of the above standards. As the record proves: (1) there was partiality towards the

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* New York City Economy Act, Laws 1934, c 178, §16.

officers and employees of the Athletic Commission since they retained their jobs, (2) there was no lack of funds, (3) no lack of work, and (4) the advisibility of the abolition of the Commission was contrary to the Moreland Commission Report on Bingo Investigation, dated March 1, 1962, the bill-jacket for the implementing statutes regulating bingo, Article 19-B of the Executive Law and Article 14-H of the General Municipal Law. This was specifically pointed out to the Respondent Carey two weeks before the 1975-76 Budget was adopted. On March 17, 1975, Hon. Thomas B. Gilchrist, Jr., the Moreland Commission who wrote the "Report on the Bingo Control Inquiry" (A-16)*, sent a personal letter to the Governor, a copy of which is attached as Appendix 19 to

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* Attached to Petitioners' Appellate Division Brief.

the Petitioners' Brief to the Appellate Division. Mr. Gilchrist advised the Governor that:

> "To abolish the Bingo Commission is to reject the Legislative (and Executive) mandate to supervise Bingo operations from the State level. To fail to budget and appropriate funds for this to be done is to turn the clock back to 1960." (A-19a)*

This was also the point of the in-depth "Memorandum in Opposition" prepared by the staff of the Bingo Commission referred to at pg. 27, supra.

It is respectfully submitted that the record herein proves beyond any doubt that Respondents' actions as alleged in the Complaint herein were done not with "good faith" but with "bad faith".

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* Attached to Petitioners' Appellate Division Brief.

HOW THE FEDERAL QUESTIONS WERE RAISED.

A. As alleged in Petitioners' Complaint:

1. In ¶¶31, 32, 33 and 41 of the Complaint (45, 46, and 49), facts are alleged indicating the violation of the XIV Amendment to the United States Constitution, §1, by the diversion of income from what had been legitimate bingo license fees imposed by the Legislature under the police power of the State, into the General Fund of the State as revenue, thus converting the license fees into an unconstitutional excise tax.*

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* Part of the theory behind the allegations in the "THIRD CAUSE OF ACTION" is that Petitioners had a direct interest in compelling Respondents to constitutionally use the Bingo license fees to pay for the operation of the Bingo Commission enforcement program (which in the past had always included Petitioners' salaries) and to enjoin such diversion by Respondents Carey, Goldmark, Burke, Van Laak, Cuomo and Croteau for State General Fund purposes.

2. In ¶43 of the Complaint (49-50), facts are alleged regarding the deprivation of the civil service Petitioners' XIV Amendment rights of due process of law, vix: termination without notice and without a hearing as required by §75 of the New York State Civil Service Law (supra, pgs. 13 and 13a).

3. In ¶¶22-24 (42-43) and ¶49 (52) facts are alleged which constitute deprivation of Petitioners' "constiutitional rights and property without due process of law" by the usurpation or causing the usurpation of their offices and civil service positions which resulted in their wrongful discharge.

B. In Petitioners' Motion Papers Before Special Term:

1. Ball Affidavit sworn to on November 20, 1975 (14) where it is claimed that Petitioners were "unconstitutionally discharged."

2. In ¶3 of Ball Answering & Moving Affidavit sworn to on December 30, 1975 (131-132), where facts are alleged concerning the Respondents' actions which resulted in the unconstitutional imposition of an excise tax upon the licensees of the Bingo Commission, which would be a violation of the XIV Amendment rights of the Petitioners and the Commission's licensees as explained in the footnote on pg. 57, supra.

3. In ¶8.F. (138-139) of said December 30, 1975 Affidavit, Petitioners allege denial of their right to equal protection of the law in violation of the XIV Amendment by Respondents giving preferential treatment to the officers and employees of the Athletic Commission who did not lose their jobs although they were in the identical position as Petitioners insofar as the

failure of the Legislature to transfer their functions to the Office of the Secretary of State.

4. In ¶18 of Ball Moving Affidavit sworn to on the 1st day of July, 1976 (261-262, 264-265) where facts are again alleged regarding the denial of equal protection of the law under XIV Amendment.

The foregoing points were presented to Special Term in POINT VI, pgs. 40-44 of Plaintiffs' (Petitioners') Memorandum of Law, submitted upon Respondents' Motion to Dismiss Plaintiffs' Complaint, a copy of which will be filed with this Petition.

C. In Petitioners' Briefs to the Appellate Division of the Supreme Court, Third Department:

1. In POINT II.A., pgs. 35-43, which is entitled "PLAINTIFF-APPELLANTS HAVE

BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW."

2. In POINT II.B., the subpoint entitled:

> "Under the Police Power, Bingo Licensing Fees Must Be Used by the State for Bingo Administration and Enforcement." (p 45-50 of said Brief.)

which discussed the imposition of an excise tax upon licensees in violation of the XIV Amendment that resulted in the diversion of license fees needed to sustain the operation of the Bingo Commission by Respondents including Petitioners' salaries.

D. In Connection with Petitioners' Attempt to Have the New York Court of Appeals Review the Appellate Division's Decision, Appendix A:

1. In the Petitioners' Affirmation dated August 24, 1978 (copy to be filed with this Petition) in answer to the Re-

spondents' "Motion to Dismiss Petitioners' (direct) Appeal to the Court of Appeals" as a matter of right, several constitutional questions were specifically raised. They are:

a. Depriving the civil service Petitioners of their permanent employment without the due process of law to which they are entitled and is required by §75 of the New York State Civil Service Law and Article 5, §6 of the New York State Constitution. See par. "First" at pgs. 3-5, of said Affirmation, attached as Appendix F, pgs. F-1 - F-5.

b. In par. "Second", pgs. 10-12, wherein is discussed the denial of the Petitioners' "CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW." and

reference is again made to POINT II.A., pgs. 35-43 of Petitioners' Appellate Division Brief. Specific reference is made to subparagraphs "A" through "D" on said pgs. 10-12 of the Affirmation.

2. In Petitioners' Brief upon their Motion for Leave to Appeal to the Court of Appeals dated October 10, 1978, a copy of which will be submitted with this Petition:

a. The constitutional question appears in questions 3 and 4 (at pgs. 3 and 4) of "QUESTIONS OF LAW PRESENTED" where the following questions were submitted to the Court of Appeals by Petitioners:

"3. Do the Defendants-Respondents State officers and employees have 'absolute immunity' from liability for damages suffered by the Plaintiffs-Appellants State officers and employees as a result of the violation of their constitutional rights pursuant to §§6 and 11 of

Article 1 of the New York State Constitution and the XIV Amendment to the U.S. Constitution, which sections guarantees Plaintiffs their right to due process of law and equal protection of the law in their right to be employed and received compensation therefore?

The Appellate Division answered the question in the affirmative.

4. Did the Plaintiffs-Appellants (a) have 'standing to raise the issue' of the State bingo licensing fee being converted into an 'unconstitutional revenue tax' (excise tax) by Defendants-Respondents; (b) should Special Term have granted the Plaintiff-Appellants' motion to add as Plaintiffs four bingo licensees, all of whom paid the alleged unconstitutional license fee and sought to become parties Plaintiff; and (d) did Special Term err in refusing to grant Plaintiffs-Appellants permission to serve a supplemental summons and amended complaint to add parties Plaintiff?

The Appellate Division answered the question in the negative."

b. In "POINT I." of said Brief, (pgs. 6-10), entitled: "THERE IS NO

'ABSOLUTE IMMUNITY' FOR ALL TORTIOUS CONDUCT COMMITTED BY THE NEW YORK STATE OFFICERS AND EMPLOYEES, PARTICULARLY THAT INVOLVING UNCONSTITUTIONAL ACTS."

c. In "POINT II." of said Briefs (10-14) entitled: "THE PLAINTIFFS-APPELLANT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT."

d. In "POINT IV" of said Brief (pgs. 17-18) where the same issue is mentioned as in C.2., pg. 61, supra.

REASONS FOR GRANTING THE WRIT.

There are two special and important reasons why a writ of certiorari should be granted herein:

First, the New York courts have departed from their case law developed over 150 years* and, for the first time, have held that the Governor of the State of New York and other high officials and employees of the Executive Department are "absolutely immune" from liability for intentional tortious conduct committed against other state officers holding term appointments and civil service personnel holding permanent appointment. The absolute immunity was extended even though the intentional

* See Adsit v. Brady, 4 Hill (N.Y.) 631.

acts (malicious interference with Petitioners' employment and wrongful discharge) deprived Petitioners of their property rights in continued employment, which right is safeguarded by their constitutional rights (1) to due process of law and (2) the right to equal protection of the law, guaranteed by both the XIV Amendment to the United States Constitution and §§6 and 11 of Article 1 of the New York State Constitution. See Cooperman v. Department of Correctional Services, 57 A.D. 2d 989, 394 N.Y.S. 2d 324 at 325-6, citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S Ct. 2701, 33 L Ed. 2d 548.

Second, said determination by the New York courts is also contrary to the decision of the Supreme Court of the

United States.

The Appellate Division herein has held that, assuming that all of the allegations in Petitioners' Complaint are true, the Resspondents need not respond in damages because of the "absolute immunity" they have from their intentional, tortious conduct (Appendix A, pg. A-1.)

RE CIVIL SERVICE PERSONNEL: Article 5, §6 of the Constitution has been interpreted by the New York Court of Appeals as giving "at least something like permanency of tenure to appointees in the civil service, and above all to put an end to the vicious practice which had grown up out of changing employees whenever the appointing power was changed without any cause

except the unrestrained will of the person who happened for the time being to be at the head of the department."

Matter of Seeley v. Stevens, 190 N.Y. 158, 163.

> "If the Legislature should repeal all the (Civil Service) statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would remain, and would so far execute itself as to require the court, in a proper case, to pronounce appointments made without compliance with its requirements illegal. (People ex rel McClelland v. Roberts, 148 N.Y. 360, 366.)"
>
> Wipfler v. Klebes
> 284 N.Y. 248 at 254.

Both the New York Court of Appeals and the Supreme Court of the United States have held that tenured (permanent) civil service appointees have a constitutionally protected interest, even a property interest, in their right to employment

and compensation therefor, of which they cannot be deprived without due process, including at least a hearing. See Slochower v. Bd. of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L Ed. 692; Harris v. Mechanicville Central Sch. Dist., 86 Misc. 2d 144, 382 N.Y.S. 2d 251 at 254; mod. other grds., 57 A.D. 2d 231, 394 N.Y.S. 2d 302.

In the case at bar, the rights of the permament, tenured civil service Petitioners are firmly grounded in the highest expression of public policy in the State--the provisions of Article 5, §6 of the New York State Constitution. The Appellate Division's decision in this case collides with the ever-present and dominating constitutional safeguards protecting permanently appointed civil service personnel

which the New York Court of Appeals has declared it always stands ready to protect. (Corwin v. Farrell, 303 N.Y. 61 at 66.)

A statute which clearly conflicts with a constitutional provision must fall. See McKinney's Consolidated Law of New York, Book 1, Statutes, §150, Pgs. 309-310, notes 71-73. Therefore, it is respectfully submitted that if the foregoing applies to statutory enactments, a fortiori, it must apply to judicially established case law.

RE NON-CIVIL SERVICE PERSONNEL: Both non-civil service personnel, who held exempt status as classified under the Civil Service Law, and the permanent civil service personnel, have been denied their

right to equal protection under the law, a point Petitioners raised but which was ignored by the Appellate Division because of the "absolute immunity" it conferred on the Respondents. The point is briefed in depth in Petitioners' Appellate Division Brief, POINT II.A., pgs. 35-43, entitled: "PLAINTIFFS-APPELLANTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW."

The question has been involved in this case from the outset when the Petitioners moved for a temporary injunction. In their Reply Affidavit dated December 10, 1975, ¶¶13 and 14 (67-68), the unequal treatment of the Petitioners as contrasted with the treatment afforded officers and employees of the State Athletic Commission was alleged. The question was again

alleged in Petitioners' Answering Affidavit on the Respondents' motion to dismiss the Petitioners' Complaint (135-139).

Both the State and Federal Constitutions guarantee the Petitioners' equal protection pursuant to the XIV Amendment of the United States Constitution and Article 1, §11 of the New York State Constitution. Both provisions proclaim a public policy of a much higher authority than the case law policy enunciated by the Appellate Division in their decision granting "absolute immunity" to the Respondents. The effect of the "absolute immunity" rule is to override the constitutional protection afforded by the State and Federal Constitutions to all Petitioners, which in and of itself is an unconstitutional determination by that Court.

In Cooper v. Aaron, 358 U.S. 1, 3 L Ed. 2d 5 at 16, 78 S.Ct. 1401, this Court held:

> "The controlling legal principles are plain. The command of the 14th Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.
>
> The constitutional provisions, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

The New York Court of Appeals has also held that:

> "An agency of the State denies equal protection when it treats persons similarly situated differently under the law * * * and this difference may be created by the grant of a preference as well as by the imposition of a burden."
>
> Abrams v. Bronstein
> 33 N.Y. 2d 488, 354 N.Y.S. 2d 926-929-30.

> "The right to equal protection of the laws is a constitutional protection against what is frequently referred to as 'class legislation'. The essence of the right to equal protection of the law is that all persons similarly situated be treated alike. (Citing cases)."
>
> Myer v. Myer
> 271 A.D. 465, 66 N.Y.S. 2d 83 at 90; affd. 296 N.Y. 979.

The facts herein sustain a finding that the Petitioners have been subject to "individual discrimination", "clear and intentional" in violation of the XIV Amendment. See DiMaggio v. Brown, 19 N.Y. 2d 283, 290; 279 N.Y.S. 2d 161, 166.

The foregoing is discussed in depth under POINT II.A. of Appellants' Appellate Division Brief, entitled: "PLAINTIFFS-APPELLANTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW" commencing at pg. 35, copy to be

filed with this Petition.

The Petitioner Commissioners Freda, Pickney and Moskovit are in the same position that the Petitioner Ball was in Ball v. State, (Appendix D, D-1 - D-24.) and are entitled to the same constitutional protection that Ball received*, including their right to salary as provided in ¶5 of §433 of the Executive Law (50, ¶43, Complaint, as amended).

The Petitioner-Appellant Commissioners were all appointed for a definite and fixed term by the Governor, their salaries were fixed by law and "attached to the

* In this action, Ball only seeks to be reimbursed for the expenses he incurred after April 1, 1975 in attempting to perform his duties and responsibilities.

office"; through no fault of their own, they were prevented from performing their duties. Nichols v. MacLean, 101 N.Y. 528 at 533, sustains the Petitioner Commissioners' right to their salary and any expenses incurred after April 1, 1975.

All of the foregoing is also applicable to the Petitioner staff members (Lynch, Tedesco and Jensen) who were appointed by the Commission pursuant to ¶7 of §433, Executive Law, and were never terminated by the Commission (¶7, Complaint (30).).

CONFLICT WITH THE FEDERAL LAW.

The decision of the Appellate Division, Third Department, is in direct conflict with the decision of this Court in Belknap v. Schild, 161 U.S. 10, 18-21, 40 L Ed. 599 and Scheuer v. Rhodes, 416 U.S. 232

at 242-249.

The Petitioners holding permanent civil service status have recognized rights in their continued employment which are safeguarded by procedural due process and cannot be extinguished except for cause, following an opportunity for a hearing. See Bd. of Regent of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L Ed. 2d 548 and other cases cited by the Appellate Division, Third Department, in Cooperman v. Commission, Dept. of Correctional Services, 57 A.D. 2d 989, 394 N.Y.S. 2d 324 at 325-6.

In Belknap v. Schild, supra, this Court held:

> "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person

> whose rights of property they have wrongfully invaded or injured, even by authority of the United States (citing cases.). Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent. (Citing Cases.)" (Pg. 18 of 161 U.S.)
>
> * * * *
>
> "'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence, he must show that his authority was sufficient at law to protect him.' * * * To this class belongs also the recent case of U.S. v. Lee, 106 U.S. 196, for the action of ejectment in that case is in its essential character, an action for trespass, with the power of the courts to restore the possession to the plaintiffs as part of the judgment. * * *." (Pg. 19 of 161 U.S.)

The Court is reminded that the only

authority that the Respondent Governor had over the State Bingo Control Commission was to (1) appoint the members of the Commission, (2) to designate its Chairman, with the consent of the New York State Senate, and (3) to remove them for cause. See §433 of the New York Executive Law, supra, pgs. 13-a- 14. The remaining Respondents had absolutely no authority over Petitioners.

It is respectfully submitted that the usurpation of the Petitioners' offices and civil service positions is actually a "trespass" upon the Petitioners' property (their offices and civil service positions).

The liability of the officers is the same whether they are State or Federal officers. See pg. 22, supra.

The immunity of the sovereign from

suit does not protect public officers from personal liability for their wrongful acts in excess of their official authority, and an officer--executive, administrative, quasi-judicial, ministerial, or otherwise--who acts outside the scope of his jurisdiction and without authorization of law, may thereby render himself subject to personal liability in a civil suit.

Cooper v. O'Connor
99 F 2d 135, cert. den. 305 U.S. 643 and 673, 83 L Ed. 436 and 1530, 59 S.Ct. 241 and 1035.

63 Am Jur., Public Officers, §291, pgs. 801-802, note 39.

Petitioners appreciate that Scheuer, supra, pgs. 77-78, was an action pursuant to 42 USCA 1983, a so-called "civil rights" case, but it is submitted that (1) Petitioners' civil rights herein have been invaded by the Respondents and (2)insofar as

Respondents' immunity is concerned, there is no difference in theory between immunity in the case at bar and a case brought pursuant to 42 USCA 1983.

As stated in Scheuer, at pg. 248 of 416 U.S.:

> "Under the criteria developed by the precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive official have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' Sterling v. Constantin, 287 U.S., at 397. In Sterling, Mr. Chief Justice Hughes put it in these terms:
>
> 'If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at anytime disclose by the simple process

> of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Upon our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.'" (Emphasis supplied.)

If the foregoing applies to a statute in New York, a fortiori, it must apply to judicially established case law such as the Appellate Division has established for the first time in the case at bar.

CONFLICT WITH NEW YORK STATE LAW

Up until the within Decision, there has never been "absolute immunity" for New York State officers and employees for tortious

conduct (other than the judiciary) particularly when the conduct involved unconstitutional actions.

The Courts of the State of New York have held personally liable members of the Long Island State Park Commission, the State Engineer and his assistants, the State Superintendent of Public Works, the State Conservation Commission, the Transit Commission of the State of New York and many others.

Pauchogue Land Corp. v. Long Island State Park Commission, 243 N.Y. 15, involved the personal liability of the members of that Commission. The Court of Appeals, at pg. 23 thereof, casts great doubt upon the "absolute immunity" theory by stating:

> "But, though the state cannot be subjected to hostile litigation at the instance of the individual, that immunity is not possessed by its officers, who can be held responsible for illegal trespass or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. * * * But the sovereign's agents are not above the law. The illegality of the official's act does not place him above the immunity of the sovereign. He must justify himself by showing that he acted rightfully as a public officer. (Citing cases.)" (Emphasis supplied.)

Pauchogue is factually in point with the case at bar. There, the Park Commission attempted to appropriate by condemnation certain lands of the plaintiff who had "the constitutional right to just compensation." As in the case at bar, the Defendants seized the property with knowledge and notice that their actions were illegal and that they were destroying the lawful rights of the owner (pg. 21 of 243 N.Y.).

The Court treated the question as one of constitutional law (pg. 26 of 243 N.Y.) and held that although the Complaint did not state a cause of action against the Park Commission "nor against the members thereof as such, it did state a cause of action against the individual defendants" members of the Commission.

The leading case of Litchfield v. Bond, 186 N.Y. 66, dealt with the State Engineer and his assistants who entered on private land, appropriated it and were held personally liable for damages proved.

These are but a very small sample of the numerous cases where high state officials have been held personally liable for damages for their ordinary torts. In the case at bar, we have an intentional tort, a ministerial act committed without any

authority whatsoever. In none of these cases was there any mention of the defense of "absolute immunity."

The Respondents herein never claimed "absolute immunity": They always claimed their acts were legal. However, on the Resondents' motion to dismiss the Complaint, the Court must treat the allegations of the malicious interference with Petitioners' employment and unlawful discharge as true.

The only public officer who have "absolute immunity" under the laws of the State of New York are members of the judiciary and to a somewhat lesser degree, officers acting in a quasi-judicial capacity. See Yates v. Lansing, 5 Johns. R. 282, 290 (N.Y. 1810). Pearson v. Ray, 386 U.S. 547 at 553-4. Also "Suits Against Government

and officers: Damage Actions," 77 Harvard Law Review, 209 at 219.

Petitioners again call the Court's attention to the statement by Judge Keating in Lombardo v. Stoke, 18 N.Y. 2d 394 at 402, 276 N.Y.S. 2d 97 at 103, in which eight of the nine Court of Appeals judges joined, that "absolute privilege should be sparingly extended" referring to cases of defamation.

However, any alleged "absolute immunity" must give way to Petitioners' pervasive constitutional right to his civil service position, particularly when that opposing right is grounded in the acts of State officers who have acted illegally

and beyond the scope of their official power and authority. Under the Civil Service law, before the permanent Civil Service Plaintiffs could be dismissed from his position, they were entitled to a written notice of the basis of and a hearing in connection with any such dismissal from the Civil Service (Civil Service Law §75.). This they never received. See Complaint, ¶7 (30).

Catone v. Hopkins
6 A.D. 2d 972, 176 NYS 2d 738 at 740.

Also directly in point is

McGraw v. Gresser
226 N.Y. 57

where the President of the Borough of Queens removed his executive clerk for political reasons without charges and without a hearing. It was held by the Court

that, although the civil service employee could have recovered his salary by mandamus, this did not bar the permanent civil service Plaintiff from recovering his salary from the Borough President personally.

What the Appellate Division has done here is to wipe out the constitutional rights of the Plaintiff Civil Service personnel by barring their cause of action with the case law thoery of absolute immunity. This is error. (See Matter of Seeley v. Stevens, 190 N.Y. 158 at 165.)

The remaining Petitioners are in the same legal position as the civil service personnel, particiularly since Ball v. State affirmed Chairman Ball's right to his salary as against the State. It would be unjust and inconsistent with Ball to hold that the other Commissioners and the

appointees of the Commission could not recover their salaries from the individual Respondents who/tortiously interferred with by the identical acts their rights to continued employment.

The State Courts have no authority to grant a State officer any immunity from a legal responsibility imposed by the supreme authority of the United States Constitution. See Scheuer at pg. 237 of 416 U.S.

CONCLUSION.

The Decision of the Appellate Division of the Supreme Court of the State of New York, Third Department, is palpably erroneous. It grants immunity to State officers who, up until the Third Department rendered its Decision, had no such immunity for probably 150 years (See Adsit v. Brady,

4 Hill (N.Y.) 631). The decision flies squarely into the face of Judge Keating's 1966 admonition in Lombardo v. Stoke, 18 N.Y. 2d at 402, 276 N.Y.S. 2d at 103 that "absolute privilege should be sparingly extended," even in cases of defamation, where immunity has been more liberally granted.

The present Petition for a writ of certiorari should be granted to resolve the conflict between the decision of the Appellate Division, Third Department, and the decisions of both this Court and prior decision of the New York Courts.

Dated: February 16, 1979

Ira M. Ball

Petitioner pro se and as
Attorney for Petitioners
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VERIFICATION

STATE OF NEW YORK) ss.:
COUNTY OF ONEIDA)

Ira M. Ball, being duly sworn, deposes and says:

That deponent is one of the Petitioners herein and the attorney of record for said Petitioners in the within action.

That deponent has read the foregoing Petition for Writ of Certiorari and knows the contents thereof.

That the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponenet believes it to be true.

Ira M. Ball

Ira M. Ball

Subscribed and sworn to
before me this 16th day
of February, 1979.

Notary Public, Oneida County
My commission expires 3/30/79